STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 21, 2003
v	No. 235728 Muskegon Circuit Court
DARRELL VELA, Defendant-Appellant.	LC No. 00-044519-FC

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

A jury convicted defendant Darrell Vela of second-degree criminal sexual conduct (CSC)[1] for engaging in sexual activity with his daughter, who was under ten years old at the time of the offense. The trial court sentenced Vela to 5 to 15 years' imprisonment. He appeals his conviction and sentence as of right. We affirm.

I. Basic Facts And Procedural History

The victim in this case was born on February 10, 1989, and is the daughter of Vela and Shawn Backensto. Vela and Backensto divorced in 1992, but remained friends. Shortly after the divorce, Vela moved in with his mother, occupying a basement room in her house. A visitation agreement provided that the victim would stay with Vela once a week, every other weekend, and for six weeks each summer; however, Backensto agreed to let Vela see the victim more often if he wished. According to the victim, she spent every weekend with Vela. While visiting Vela at his mother's house, the victim would share a bed with Vela. After Vela's mother died in 1995, he moved to what the parties refer to as "the blue house."

In 1994, Backensto took the victim to gynecologist Dr. Lourice David after noticing genital redness and irritation. David's examination was limited by the victim's age and uncooperativeness, although the results were sufficient to raise concerns about possible molestation. However, Backensto told David that molestation was not a possibility because the victim was never left with anyone except Backensto's parents and Vela.

[1] MCL 750.520c(1)(a).

In 1997, the victim's teachers notified Backensto that she was having emotional problems that affected her grades, and Backensto recalled that the victim seemed obsessed with seeing her father during this time. Backensto filed a motion to cease visitation with Vela in February of 1998 because of concerns that Vela was drinking during visitation and allowed a woman to spend the night with him during visitation; however, this motion was resolved when the parties signed an agreement wherein visitation would continue as before if Vela would pay increased child support.

Concerns about sexual abuse resurfaced in the fall of 1998, when the victim called Backensto's attention to bumps in her genital area. Backensto brought the victim to a pediatrician who diagnosed the bumps as venereal warts caused by the human papilloma virus (HPV). According to the expert testimony at trial, HPV is most commonly transmitted by sexual contact, although it can also be transmitted through other means, including sharing a towel or toilet seat with an infected person or passing through the birth canal of an infected mother. Both Vela and Backensto have HPV.

On October 1, 1998, Backensto again took the victim to David who, despite the victim's uncooperativeness during the examination, was able to confirm the existence of venereal warts. According to David's notes from this examination, the victim's hymen was intact. David decided to delay performing a complete examination until the victim returned to have her warts surgically removed, when she would be unconscious from general anesthesia and easier to observe.

When David anesthetized and began treating the victim over a week later, she noticed that the victim's hymen was in fact damaged, and also that there was a large vein on her anus. David testified that the scarring of the hymenal tissue indicated that the damage occurred before the October 1 examination, meaning that her initial observation that the hymen was intact was inaccurate. After the surgery, David informed Vela and Backensto that the most likely explanation for this combination of symptoms was that the victim had been sexually abused. After this revelation, Backensto and Vela agreed not to allow the victim to be with any other adults besides the two of them.

The victim met with Vicki Birdsall on September 28, 1998. Birdsall told Backensto that the victim's description of her relationship with Vela, including the facts that Vela sent her flowers, asked her to wear her hair a certain way, wear certain clothes, and that they slept in the same bed, raised concerns that the relationship was inappropriate. However, the victim told Birdsall that Vela had not sexually abused her. Backensto filed a motion to cease visitation with Vela on September 30, 1998 because of continued concerns about having a woman in the house overnight during visitation and because of an ongoing Protective Service investigation. Backensto also explained that she was concerned about allowing the victim to be with Vela because she did not want the victim to be alone with certain members of Vela's family until the sexual abuser was identified.

After the victim had been questioned by Birdsall, she told her mother that she had been sexually abused by her six-year-old cousin; however, she retracted this statement a day or two later. Backensto testified that the victim then began asking questions relating to what would happen if her father were the perpetrator, and whether he would go to jail. These questions caused Backensto to call Protective Services.

Backensto and Vela took the victim to therapist Kristine Koetje in early October 1998. Shortly thereafter, the victim disclosed to Backensto that her father had been sexually abusing her, and also disclosed this fact to Koetje. Koetje asked the victim to demonstrate what had happened using stuffed animals, then gave her heart- and star-shaped stickers afterward. However, Backensto stated that the victim later recanted and told Backensto that she could not remember what happened. In January 1999, the victim met with Judge John Ruck for an in camera custody interview, at which, according to third-party accounts, she reportedly stated that Vela did not sexually abuse her and that she wanted to see him. Over the next several months, the victim also saw YWCA counselor Katherine LePink, who enrolled her in a YWCA adolescent group therapy program for sexual abuse victims, and Laurie Hawkins of the Child Abuse Council.

On October 6, 1999, the Family Independence Agency referred the victim to Dr. Vincent Palusci, a medical expert in the area of sexual abuse of children, forensic interviewing techniques, and psychological assessment, for an evaluation. Palusci observed that the victim had warts, a damaged hymen, and abnormal anal muscle tone. Taken together with the victim's own reporting of what had occurred, Palusci stated that "there was definitive evidence that she had been sexually abused."

In April 2000, Vela was charged with one count of CSC I[2] and one count of CSC II.[3] At trial, the victim testified that when she spent weekends with Vela, he would sleep in the same bed with her. According to the victim, Vela would take off his boxer shorts, then ask her to take off her underwear and pajamas, and as they lay on their sides he would put his penis inside her vagina. The victim explained that she did not tell her mother about what was happening because she trusted Vela and did not know that what he was doing was wrong. She said Vela had told her that he loved her and that "all daddies do this to their little girls." She testified that she liked visiting Vela because he took her places and bought her things. The victim stated that the abuse continued from the time she was "really, really young" until Vela moved to the blue house and began dating his present girlfriend, after which it only happened "a very few times." The victim initially believed that the police would kill her father if they found out he had sexually abused her. She explained that she denied that it was Vela to Backensto and Birdsall because she did not want to get Vela in trouble, and falsely accused her six-year-old cousin for the same reason.

Vela admitted that the victim shared his bed when staying with him at his mother's house and that they would occasionally cuddle; however, he denied that anything inappropriate or sexual occurred. He also admitted sending the victim flowers on two occasions, but explained that one occasion was to make up for an altercation she witnessed between himself and Backensto and her husband, Rick Backensto, after the Backenstos accused him of being drunk and refused to allow the victim to go with Vela to a sporting event. The second occasion was her birthday.

Vela issued a subpoena for Judge Ruck to be questioned regarding his in-camera interview with the victim in which she allegedly stated that Vela had not sexually abused her;

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[2] MCL 750.520b(1)(a).

[3] MCL 750.520c(1)(a).

however, after oral argument, visiting Judge Anthony Monton granted Judge Ruck's motion to quash on the basis that there were no "sufficient, compelling circumstances" to justify requiring Judge Ruck to disclose confidential information, particularly in light of the fact that Judge Ruck had no specific recollection of his interview with the victim.

Vela presented expert testimony of Stephen Guertin, M.D., director of a hospital pediatric intensive care unit and associate professor of pediatrics. Guertin testified that the victim's hymenal trauma could have been caused by her struggling during a medical examination or during her wart-removal surgery. Guertin also testified that there is a high incidence of false reports of sexual abuse among children who are the subject of custody or visitation disputes.

Melvin Guyer, Ph.D., also testified as an expert witness for the defense. Guyer testified that the counselors and therapists who interviewed the victim used improper techniques that may have encouraged the victim to falsely accuse Vela by continuing to question her after she denied Vela sexually abused her and by suggesting that this was the "correct" answer. Guyer explained that when a child initially denies sexual abuse, that child may be influenced into a false accusation by repeated questioning by adults who assume that the victim was, in fact, sexually abused, regardless of the victim's denials. Guyer also testified that the circumstances under which the victim accused Vela fell within a phenomenon known as "sexual abuse in divorce syndrome," or SAID. This phenomenon describes a situation in which children involved in custody or visitation disputes are encouraged, explicitly or implicitly, to accuse a parent of sexual abuse.

The jury found Vela not guilty of CSC I and guilty of CSC II. After a hearing at which several challenged items were struck from Vela's presentence information report, including references to a failed polygraph test, the trial court sentenced Vela to 5 to 15 years' imprisonment. Vela filed a motion for new trial based on the same issues asserted on appeal, including ineffective assistance of counsel, prosecutorial misconduct, erroneous admission of evidence, and a verdict against the great weight of the evidence. After a hearing, the trial court denied the motion. This appeal followed.

II. Ineffective Assistance

A. Standard Of Review

Ineffective assistance of counsel is a constitutional issue that this Court reviews de novo.[4]

B. Legal Standards

To establish ineffective assistance of counsel, defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error, it is reasonably probable that the outcome would have

[4] *People v Toma*, 462 Mich 281, 310; 613 NW2d 694 (2000).

been different.[5] Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.[6] To show an objectively unreasonable performance, defendant must prove that counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[7] In so doing, defendant must overcome a strong presumption that the challenged conduct might be considered sound trial strategy.[8] Defendant must also show that the proceedings were "fundamentally unfair or unreliable."[9]

C. Improper Stipulation

Vela argues that his counsel was ineffective for stipulating to the fact that he had the same sexually transmitted disease as the victim. At the *Ginther*[10] hearing, counsel stated that she entered into the stipulation in exchange for the prosecutor's agreement to stipulate that Backensto also had HPV and to make Rick Backensto's medical records available. Counsel explained that Vela's HPV diagnosis would likely have been revealed regardless whether she stipulated, either through the testimony of Backensto, David, or Vela himself, and she felt that her expert's testimony would establish that it was possible to transmit HPV through nonsexual means. Vela counters that this justification is flawed because counsel already had access to Backensto's HPV diagnosis through David's medical reports; however, counsel was uncertain whether these records would be admitted at trial should the prosecutor have objected on hearsay grounds. Because Vela has not overcome the presumption that the stipulation constituted sound trial strategy, we decline to reverse on this ground.[11]

D. Failure To Object

Vela next argues that counsel was ineffective for failing to object to several alleged errors, including the introduction of evidence he asserts was inadmissible. Specifically, Vela argues that counsel should have objected to the introduction of Palusci's testimony that the victim had suffered "definite sexual abuse"; David's testimony that the victim's wart-removal surgery was painful and that her prognosis was not good in light of the existence of pre-cancerous cells resulting from HPV; Birdsall's testimony regarding Vela's "courting behavior" toward the victim and the distinction between incest and molestation; Backensto's testimony that Vela paid insufficient child support, arrived drunk to scheduled visitations with the victim, and

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[5] *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674, reh den 467 US 1267; 104 S Ct 3562; 82 L Ed 2d 864, on remand 737 F2d 894 (CA 11, 1984); *Toma*, *supra*, 462 Mich at 302.

[6] *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995).

[7] *People v Mitchell*, 454 Mich 145, 164-165; 560 NW2d 600 (1997), quoting *Strickland*, *supra*, at 687.

[8] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

[9] *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

[10] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[11] *Knapp*, *supra* at 385-386.

pushed Rick Backensto on one occasion; and the trial court's laying the foundation for Palusci's qualification to testify in the area of child psychology.

Counsel explained that she did not object to Palusci's testimony of definite sexual abuse because the statement related to medical findings rather than behavioral observations regarding the victim's credibility and, furthermore, she had expert testimony that would refute the statement. Counsel further explained that she did not object to the trial court asking questions regarding Palusci's expert qualifications because the trial court had the authority to ask the questions, and the questions did not explicitly or implicitly vouch for Palusci's credibility. Because Palusci's testimony was admissible[12] and because the trial court had the authority to question the witness,[13] any objection would have been meritless. We will not predicate a finding of ineffective assistance on the failure to make a meritless objection.[14]

Counsel did not object to David's testimony relating to the victim's painful surgeries because the prosecutor did not ask whether the surgeries were painful, but rather asked an open-ended question that elicited an unresponsive answer. Moreover, counsel explained that she did not wish to draw the jury's attention to the already-uttered testimony by objecting.[15] Because this constituted sound trial strategy, the failure to object was not ineffective assistance.[16]

Vela also challenges counsel's failure to object to David's testimony regarding the victim's prognosis; however, counsel stated that she did not object because this information was relevant to determining the method of transmission and, further, counsel did not believe the information was prejudicial or had the potential to change the outcome of the case. Although David's testimony does not support counsel's contention that the precancerous nature of the cells was indicative of the method of transmission, we agree that the testimony regarding the victim's prognosis was not outcome determinative. Moreover, identical testimony was later admitted to aid the jury in understanding David's medical report, which was introduced as an exhibit, and Vela does not argue that the testimony was improper in that context. Even if the testimony should not have been admitted, however, Vela has not shown a reasonable probability that the outcome would have been different had it been excluded.[17] Therefore, this argument fails.

With respect to Birdsall's testimony regarding the nature of incest versus child molestation, counsel admitted that she did not object to that testimony and stated that she did not recall whether a proper foundation was laid for it. Although counsel offered no reason to support her failure to object to this testimony, because Vela has not shown a reasonable probability that the outcome would have been different had it been excluded, it nonetheless does not warrant a

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[12] See Issue IV(E), *infra*.

[13] See *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

[14] See *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

[15] See *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995) ("there are times when it is better not to object and draw attention to an improper comment").

[16] *Knapp*, *supra* at 385-386.

[17] See *Toma*, *supra* at 302.

finding of ineffective assistance.[18] However, counsel recalled not objecting to Birdsall's testimony that Vela brought the victim flowers so that counsel could undermine Birdsall's credibility by revealing that the flowers were sent for the victim's birthday. Because counsel failed to object to this testimony as a matter of sound trial strategy, the failure does not constitute ineffective assistance.[19]

Similarly, counsel stated that she did not object to Backensto's testimony that Vela paid insufficient child support, arrived drunk to scheduled visitations with the victim, and pushed Rick Backensto, because it furthered her trial strategy of characterizing Backensto's accusations of sexual abuse either as a means to gain an advantage in acquiring parenting time with the victim or simply to "get even" with Vela. Moreover, counsel explained that she wanted the jury to see that Backensto was vindictive, hysterical, and angry at Vela, which would undermine her credibility when contrasted with Vela's calm demeanor as well as call into question her motives for testifying against Vela. Counsel also planned to refute Backensto's testimony, thereby demonstrating that Backensto had a tendency to exaggerate minor incidents. Because counsel allowed Backensto to testify to these facts as a matter of sound trial strategy, her failure to object does not constitute ineffective assistance.[20]

E. Failure To Move For Acquittal

Vela also argues that counsel was ineffective for failing to move for a directed verdict of acquittal at the close of the prosecutor's proofs. However, counsel explained that she decided not to move for a directed verdict because it would have been futile, and making futile motions would have undermined her credibility with the court. The trial court's ruling after the *Ginther* hearing confirmed that, not only would the motion have been denied, it was "not even a close call." Moreover, the victim's testimony alone, if believed, is sufficient evidence to establish Vela's guilt of CSC beyond a reasonable doubt.[21] Because the prosecutor submitted sufficient evidence to establish Vela's guilt, we do not find defense counsel ineffective for failing to move for a directed verdict.[22]

F. Failure To Move For More Definite Time Period

Finally, Vela argues that counsel was ineffective for failing to move that the prosecution narrow the range of time in which the offense was alleged to have been committed, which was sometime between 1994 and 1998. However, counsel explained that this was a strategic decision made to avoid giving the prosecutor notice that the defense intended to argue that the CSC could

[18] See *id*.

[19] *Knapp*, *supra* at 385-386.

[20] *Id*.

[21] See *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

[22] See *People v Riley*, 468 Mich 135, 141-142; 659 NW2d 611 (2003).

not have occurred at the alleged time based on the victim's testimony and medical records. Counsel was not ineffective for pursuing this strategy.[23]

III. Prosecutorial Misconduct

A. Standard Of Review

We review de novo allegations of prosecutorial misconduct while reviewing the trial court's factual findings for clear error.[24]

B. Legal Standard

We review claims of prosecutorial misconduct on a case-by-case basis, examining the challenged conduct in context, to determine whether the defendant received a fair and impartial trial.[25]

C. Eliciting Improper Testimony From Expert

1. Vouching For Victim's Credibility

Vela alleges that the prosecutor improperly elicited testimony from Palusci that vouched for the victim's credibility, specifically, that Palusci believed there was definitive evidence that the victim had been sexually abused. Because Vela failed to object to this conduct, this issue was not preserved.[26] Therefore, Vela must demonstrate plain error that affected the outcome of the proceedings to avoid forfeiture of the issue.[27]

A review of the transcript indicates that the prosecutor did not directly ask the expert whether the victim was telling the truth, but only inquired whether, as a result of Palusci's examination, he had formed an opinion as to whether the victim had been sexually abused, and what that opinion was. The prosecutor "is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant."[28] As we will discuss in more detail below, Palusci was permitted to testify that his examination revealed that, based on the victim's physical and emotional conditions, she had

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[23] See *Knapp*, *supra* at 385-386.

[24] *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

[25] *Bahoda*, *supra* at 266-267; 531 NW2d 659 (1995); *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[26] *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999).

[27] *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

[28] *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

suffered sexual abuse, and the trial court properly admitted the testimony.[29] Therefore, we find no misconduct in the prosecutor's good-faith effort to elicit Palusci's opinion.[30]

2. Invoking Sympathy For Victim

Vela argues that the prosecutor erred in eliciting testimony regarding the victim's painful surgeries and poor prognosis, and that his conviction should be reversed based on *People v Mallory*.[31] Because Vela failed to object to this testimony, this claim was also not preserved,[32] and Vela must demonstrate plain error that affected the outcome of the proceedings to avoid forfeiture of the issue.[33]

Mallory was a murder case in which, over the defendants' objection, the prosecutor introduced "graphic testimonial evidence" that the victim had terminal brain cancer that resulted in the inability to use his right arm.[34] However, that case is distinguishable from this case in that the victim's physical condition was "completely irrelevant to any issue in the case."[35] Moreover, the Court in *Mallory* did not hold that admitting the medical information about the victim warranted reversal, and indeed stated that it "may have found this error to have been harmless beyond a reasonable doubt in a trial free of other errors." The Court only decided the evidence was improperly admitted to avoid its admission on retrial.[36]

In this case, the victim's medical condition was part of the defense theory of the case, as was apparent from the defense implications that the victim's hymenal damage was incurred during her wart-removal surgeries. Although the fact that the surgeries were painful was undoubtedly extraneous, this information was revealed through an unresponsive answer to one of the prosecutor's questions, and was not deliberately elicited. The prosecutor did inquire into the victim's prognosis, which was likely irrelevant; however, even if this was error, Vela has not shown that it was plain error that affected the outcome of the proceedings.[37] Accordingly, we decline to reverse on this ground.

D. Suppression Of Impeachment Evidence

Vela argues that he is entitled to a mistrial or new trial because the prosecutor joined with Judge Ruck's motion to quash the subpoena that would have required him to testify regarding the

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[29] See *People v LaPorte*, 103 Mich App 444, 452; 303 NW2d 222 (1981).

[30] *Noble*, *supra* at 660-661.

[31] *People v Mallory*, 421 Mich 229; 365 NW2d 673 (1984).

[32] *Avant*, *supra* at 512.

[33] *Carines*, *supra* at 752-753, 763-764; *Schutte*, *supra* at 720.

[34] *Mallory*, *supra* at 250.

[35] *Id*.

[36] *Id*. at 250-251.

[37] *Carines*, *supra* at 752-753, 763-764; *Schutte*, *supra* at 720.

in-camera interview at which the victim was alleged to have denied that Vela sexually abused her. Vela premises this argument on the general principle that "the prosecutor has an affirmative duty to produce all witnesses that he knows can offer evidence to substantiate Vela's claim of innocence."[38]

However, we are unconvinced that the prosecutor's conduct in joining the motion to quash the subpoena affected Vela's right to a fair and impartial trial. The motion was brought by Judge Ruck, not by the prosecutor, and was argued primarily by Judge Ruck's attorney. There is no indication in the record that the trial court would have ruled differently but for the prosecutor's arguments in support of the motion to quash. Moreover, the jury heard testimony from other witnesses that the victim told several people, including her mother and various counselors, that her father had not sexually abused her, which was the information the defense had hoped to elicit from Judge Ruck. Therefore, even had Judge Ruck testified to this effect, it would have been cumulative. Accordingly, Vela is not entitled to a new trial or a mistrial on this ground.[39]

E. Inflammatory Comments

Vela argues that he is entitled to a new trial because of various comments that the prosecutor made before the jury. Vela challenges twenty-three specific statements, most of which were not objected to at trial. One of the challenged statements is the prosecutor's alleged questioning of Vela's sex life. However, our review of the transcript indicated that the prosecutor made no such inquiry; rather, the victim volunteered the fact that Vela stopped abusing her after he began seeing his girlfriend. We fail to see how this constitutes prosecutorial misconduct or causes prejudice.

The remaining statements fall into two general categories: vouching for the victim's credibility, and disparaging the veracity of defense counsel and her expert witnesses. Generally, "prosecutors are accorded great latitude regarding their arguments and conduct," and are "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case."[40] Otherwise improper comments do not necessarily require reversal if they were made in response to defense counsel's arguments.[41]

As Vela properly states, a prosecutor may not vouch for the victim's credibility.[42] However, the prosecutor was entitled to argue that the evidence and its reasonable inferences supported the victim's truthfulness,[43] and a "mere statement of the prosecutor's belief in the honesty" of the victim's testimony does not constitute error requiring reversal if, taken as a

[38] *People v Hamm*, 100 Mich App 429, 437; 298 NW2d 896 (1980).

[39] *Bahoda*, *supra* at 266-267; *Aldrich*, *supra* at 110.

[40] *Id.* at 282.

[41] *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

[42] See *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

[43] See *Bahoda*, *supra* at 282.

whole, the remarks were fair.[44] Moreover, in light of defense counsel's arguments that the victim had been "brainwashed" into giving false answers, the prosecutor's statements were a permissible rebuttal to this theory of the case.[45] Having reviewed the challenged statements, we are not convinced that error requiring reversal occurred, particularly given the trial court's admonishment to the jury regarding its role as sole factfinder immediately after closing arguments.[46]

Likewise, Vela correctly states that the prosecutor may not question defense counsel's veracity.[47] Although the prosecutor stated that defense counsel was trying to mislead the jury by altering exhibits, the record indicates that after defense counsel objected to these allegations, the trial court clarified for the jury what had actually happened with regard to the exhibits while reminding them that the attorneys' statements were not evidence. This prompt instruction cured any error that occurred. Because our review of the remaining allegations does not indicate that Vela was denied a fair and impartial trial, we will not reverse on this ground.[48]

IV. Trial Court Misconduct And Errors

A. Standard Of Review

We review claims of judicial misconduct to determine whether the judge's "questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility" and "whether partiality could have influenced the jury to the detriment of the defendant's case." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

We review the trial court's decisions with respect to sequestering witnesses[49] and admitting evidence[50] for an abuse of discretion, and review de novo the constitutional issue regarding defendant's right of confrontation.[51]

B. Questioning And Laying Foundation For Prosecution's Expert

A defendant in a criminal trial is entitled to a "neutral and detached magistrate."[52] The trial court is permitted to question witnesses "to clarify testimony or elicit additional relevant

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[44] *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996); citing *People v Rosales*, 160 Mich App 304, 309; 408 NW2d 140 (1987).

[45] See *Kennebrew*, *supra* at 608.

[46] See *id*., citing *Stanaway*, *supra* at 687.

[47] *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984).

[48] *Bahoda*, *supra* at 267.

[49] See *People v Nixten*, 160 Mich App 203, 209-210; 408 NW2d 77 (1987).

[50] *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

[51] *People v Smith*, 243 Mich App 657, 682; 625 NW2d 46 (2000).

[52] *People v Moore*, 161 Mich App 615, 619; 411 NW2d 797 (1987).

information," as long as the trial court "exercise[s] caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial."[53]

Vela argues that the trial court's questioning of Palusci indicated that it believed the witness was qualified and showed favoritism to the prosecution. We agree that the trial court concluded that the witness was qualified as an expert; however, it is part of the trial court's job to determine whether experts are qualified,[54] and this certainly does not constitute error. We disagree that the trial court's questions showed favoritism to the prosecution. During voir dire, the trial court asked whether Palusci had gone to medical school; had a residency; how much time was devoted to the psychological aspects of child sexual abuse; whether, in his practice, he made findings about physical aspects of what he observed; whether he also recorded psychological aspects of what he observed; whether he took these things into account when making an assessment; whether he asked his patients about psychological issues; and, finally, asked the following:

> If I called your office tomorrow and said, Doctor, would you give us a speech about the psychological aspects or symptoms that one might experience in child victims of sexual abuse, would you say, I'll be there next week or would you say, you'd better talk to one of my partners who deals in this area?

After receiving the answers to these questions, the trial court concluded, "I'm satisfied we've got a foundation for these questions." These questions were intended to "elicit additional relevant information," and were neutral rather than "intimidating, argumentative, prejudicial, unfair, or partial."[55] Therefore, the questioning was proper, and was wholly distinguishable from that in *People v Smith*,[56] in which the trial court directly confronted the defendant's expert witness with a conflicting expert opinion that contradicted his main defense.[57]

Vela also argues that the trial court "may not assume the prosecutor's role and establish the admissibility of proffered evidence" on the basis of *People v Kreiner*.[58] However, *Kreiner* does not stand for that proposition. In *Kreiner*, the Michigan Supreme Court held that the trial court erred in admitting a certain statement under the "tender years" exception to the hearsay rule, although the same statement might have been admissible as an excited utterance.[59] The Court found that because the trial court's characterization of the statement was not factually supported, the record was not sufficiently developed to determine whether the statement met the

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[53] *Cheeks, supra* at 480.

[54] See, e.g., *People v Gambrell*, 429 Mich 401, 407; 415 NW2d 202 (1987) ("the determination of a witness' expert qualifications lies within the discretion of the trial court").

[55] *Cheeks, supra* at 480.

[56] *People v Smith*, 64 Mich App 263; 235 NW2d 754 (1975).

[57] See *id*. at 266.

[58] *People v Kreiner*, 415 Mich 372; 329 NW2d 716 (1982).

[59] *Id*. at 378-379.

criteria.[60] Accordingly, the Court specified that, on remand, "the prosecutor may attempt to establish a foundation for admitting the testimony."[61] In short, *Kreiner* did not address the question whether it is improper for a trial judge to lay the foundation for testimony; rather, it held only that the trial court's conclusion respecting the testimony was factually unsupported. Because Vela failed to cite any legal authority to support the position that the trial court may not establish the admissibility of proffered evidence, we deem this particular argument abandoned.[62]

C. Violating Right To Confront Witness

Vela argues that the trial court violated his right of confrontation by granting the motion to quash Judge Ruck's subpoena. Although Vela does not state the argument clearly, it appears to be premised on the idea that Vela was denied the opportunity to effectively cross-examine the victim because the trial court excluded extrinsic evidence of the victim's prior inconsistent statement regarding what she had told Judge Ruck by quashing his subpoena.

At trial, when asked whether she told Judge Ruck that Vela sexually abused her, the transcript reflects that the victim paused before stating, "I'm pretty sure I told him it was my dad." Vela sought to impeach this testimony by introducing evidence that the victim had actually told Judge Ruck that Vela had not sexually abused her; however, a visiting judge quashed the subpoena on the ground that the circumstances did not warrant violating the confidentiality of the in-camera interview.

Among the primary interests secured by the constitutional right to confront a witness are the right to cross-examine and impeach the witness' testimony.[63] Vela correctly observes that "[e]xtrinsic evidence of an inconsistent statement is admissible if the witness is afforded the opportunity to explain or deny and the opposing party is allowed to interrogate him thereon,"[64] and, further, that "common-law or statutory privileges, even if purportedly absolute, may give way when in conflict with the constitutional right of cross-examination."[65]

However, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[66] In this case, Vela had ample opportunity to establish through other witnesses that the victim had given inconsistent accounts to many people, including Backensto and several counselors, respecting whether Vela sexually abused her. Accordingly, quashing Judge Ruck's subpoena did not deprive Vela of the opportunity to establish this defense.

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[60] *Id*. at 379.

[61] *Id*.

[62] See *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

[63] *People v Mallory*, 421 Mich 229, 263-264; 365 NW2d 673 (1984).

[64] *People v Hogan*, 105 Mich App 473, 481; 307 NW2d 72 (1981).

[65] *People v Adamski*, 198 Mich App 133, 137; 497 NW2d 546 (1993).

[66] *People v Bushard*, 444 Mich 384, 391; 508 NW2d 745 (1993), quoting *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985).

Moreover, the victim's statement that she was "pretty sure" she had told Judge Ruck Vela had sexually abused her was far from unequivocal, and impeaching this statement would thus have had little effect on the victim's overall credibility. Finally, it is unlikely that Judge Ruck's testimony would have been relevant to the issue in light of the fact that he had no memory of his in-camera interview with the victim, and the interview was not recorded. Under these circumstances, we conclude that Vela's right of confrontation was not violated by his inability to question Judge Ruck.

D. Failing To Sequester Witnesses

Vela argues that the trial court erred by allowing Chad Crummel, the FIA caseworker who was the complainant in the underlying child protective proceeding, to remain in the courtroom during other witnesses' testimony before taking the stand. Vela does not argue that the trial court abused its discretion in refusing to sequester Crummel, which is the applicable standard of review.[67] Rather, citing *People v Hill*,[68] Vela asserts only that requests to sequester witnesses should generally be granted.[69] However, as the next sentence of that case explains, a showing of prejudice is required to justify reversal.[70] Because Vela does not explain why the failure to sequester Crummel had any effect, prejudicial or otherwise, on the trial, his argument fails.

E. Allowing Inadmissible Expert Testimony

Palusci testified that, after an examination, he makes a conclusion respecting the likelihood of sexual abuse on a scale ranging from no evidence to definite evidence and, in this case, he concluded that there was definite evidence that the victim had been sexually abused. Vela argues that his conviction must be reversed in light of *People v Peterson*[71] and *People v Garrison (On Remand)*,[72] which hold that an expert in a child sexual abuse case may not testify that sexual abuse occurred. However, this line of cases, which had its genesis in *People v Beckley*,[73] applies to expert testimony regarding a child's *behavior*, not medical symptoms. Specifically, the *Beckley* court determined the circumstances under which an expert could testify "regarding the characteristics and patterns of behavior typically exhibited by sexually abused children."[74]

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[67] *Nixten*, *supra* at 209-210.

[68] *People v Hill*, 88 Mich App 50; 276 NW2d 512 (1979).

[69] *Id*. at 65.

[70] *Id*. See also *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985).

[71] *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995).

[72] *People v Garrison (On Remand)*, 187 Mich App 657; 468 NW2d 321 (1991).

[73] *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990).

[74] *Beckley*, *supra* at 697. See also *Peterson*, *supra* at 370-375; *Garrison*, *supra* at 658-659.

By contrast, this Court has held that a *medical* expert may testify, based on the physical and emotional conditions of the victim, that the victim was sexually penetrated against her will.[75] Because Palusci's testimony in this case was medical rather than behavioral in nature, it was admissible, and the trial court did not abuse its discretion in admitting it. Moreover, on cross-examination, defense counsel specifically asked Palusci to reiterate that he "felt that this was a definitive case of sexual abuse based upon the medical evidence," and Palusci agreed. Vela may not assign as error testimony that his own counsel elicited, because to do so would permit Vela to harbor error as an appellate parachute.[76] For these reasons, we decline to reverse Vela's conviction on this ground.

F. Coercing Quick Jury Verdict

We review claims of coerced jury verdicts case by case, considering all the facts and circumstances surrounding the challenged conduct.[77]

Under certain circumstances, a defendant can be denied the right to a fair trial "where the trial court creates an atmosphere which seemingly requires a hasty verdict."[78] Vela argues that the trial court did so in this case by telling the jury that the trial would only last about four days; pointing out that they were behind schedule about halfway through the trial; expressing a desire not to have the case "linger over the weekend." Vela also challenges the trial court's instructions:

> We'll have some more testimony and then we will finish our portion of the case and deliver it to you for your deliberations tomorrow in the afternoon. What happens then is up to you. I don't want to say anything that hints or suggests how long you deliberate. That's completely up to you. But I need to talk to you about scheduling things for a minute. The first thing I should say is this: some jurors prefer to go beyond 5:00 and, you know, keep on working. That will be your call . . . If you do stay beyond five, we will feed you. Okay? Friday, the county building is closed. It's the Veterans Day holiday. Now, I've told you not to come in on Mondays previously because we have motion day, but this Monday, we would continue your deliberations because we don't need the courtroom for you to deliberate . . .
>
> So what I'm saying to you is this: we'll have the case to you tomorrow afternoon. What happens after that is up to you. You know, if you—if you want to deliberate into the evening; that's fine. If you want to knock it off at a reasonable hour tomorrow and then come in again the next day, that's fine. But the next day would be Monday. It won't be Friday, it would be Monday.

[75] See *People v LaPorte*, 103 Mich App 444, 452; 303 NW2d 222 (1981).

[76] See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

[77] *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989).

[78] *People v London*, 40 Mich App 124, 128; 198 NW2d 723 (1972).

We find nothing in this record to indicate coercion,[79] particularly where the trial court's comment about not wanting the trial to "linger" was made out of the jury's presence.

V. Verdict Against The Weight Of The Evidence

A. Standard Of Review

We review for an abuse of discretion the trial court's denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence.[80]

B. Weighing The Evidence

Vela argues that the verdict was against the great weight of the evidence because Birdsall, the first counselor to interview the victim, admitted that she focused on Vela as the person who most likely abused the victim, and because Vela's experts testified that "all the 'red flags' were present in this case" to cast doubt on the victim's accusation.

A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.[81] In this case, the evidence against the verdict consisted of Vela's denial, expert testimony regarding the likelihood that the victim fabricated the incident, and David's report indicating that the victim's hymen was intact after she was alleged to have been penetrated. The testimony of Vela and his expert witnesses was contradicted by the testimony of the victim and other expert witnesses. We defer to the jury's determination respecting the relative credibility of these witnesses.[82] Moreover, David explained at trial that her initial report of the victim's intact hymen was likely mistaken. Under these circumstances, we cannot conclude that the verdict was against the great weight of the evidence.[83]

VI. Resentencing

A. Standard Of Review

We review the trial court's denial of the motion for resentencing for an abuse of discretion.[84]

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[79] See *People v Vettese*, 195 Mich App 235, 244-245; 489 NW2d 514 (1992).

[80] *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

[81] *People v Lemmon*, 456 Mich 625, 641; 576 NW2d 129 (1998).

[82] See *id*. at 646-647.

[83] See *id*. at 641.

[84] *People v Puckett*, 178 Mich App 224, 227; 443 NW2d 470 (1989).

B. Inadmissible Information

Vela argues that he is entitled to resentencing before a different judge because the trial court relied on inadmissible information at sentencing, specifically, the results of Vela's polygraph test and a letter referring to a previous unrelated incident of inappropriate sexual behavior. This argument is unsupported by the sentence hearing transcript, which indicates that the trial court agreed to delete the challenged items from the presentence information report,[85] and the trial court's June 21, 2001 ruling on Vela's motion for resentencing, in which the trial court stated that it did not consider improper information in sentencing Vela. The sentencing transcript further indicates that the trial court made no reference to the challenged materials in its ruling, but rather relied on the fact that the jury had convicted Vela of "a horrific crime" that "inflicted psychological and severe physical damage" on his daughter. For this reason, the trial court determined that "the sentence should be at the maximum of the sentencing guidelines." We find no abuse of discretion either in this determination or the trial court's denial of Vela's motion for resentencing.[86]

VII. Bond Pending Appeal

Vela's appellate brief requests that he be released on bond pending appeal; however, Vela did not make a motion for bond under MCR 7.209. Because Vela's appeal is no longer pending, this issue is moot.

VIII. Conclusion

Because Vela has failed to establish the existence of any errors meriting a new trial, mistrial, or reversal, we affirm his conviction and sentence.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray

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[85] See MCR 6.425(D)(3).

[86] *Puckett*, *supra* at 227.